UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCE OFFICE

BHP COPPER INC.

and Case 28-CA-094380

EDGAR NEWTON, an Individual

Chris Doyle, Esq., Phoenix, AZ,
for the Acting General Counsel.
Christopher Mason, Esq., and *Adam Merrill, Esq.,* Phoenix, AZ, for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona on March 19, 20, and 21, and April 2 and 3, 2013. Edgar Newton, an individual (the Charging Party or Newton), filed an unfair labor practice charge in this case on December 6, 2012.[1] Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing (the complaint) on January 31, 2013. The complaint alleges that BHP Copper Inc. (the Respondent, the Employer, or BHP) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[2]

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the Acting General Counsel and counsel of the Respondent, and my observation of the demeanor of the witnesses,[3] I now make the following findings of fact and conclusions of law.

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[1] The General Counsel's formal documents, G.C. Ex. 1(a) and 1(b), establish the filing and service of the charge as alleged in the complaint.

[2] All pleadings reflect the complaint and answer as those documents were finally amended at the hearing.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

FINDINGS OF FACT

I. Jurisdiction

The complaint alleges, the Respondent's answer admits, and I find that at all times material herein, the Respondent has been a corporation, with an office and place of business located in Miami, Arizona, where it operates the Pinto Valley Mine, and has been engaged in the business of mining, processing, and shipping copper. Further, I find that during the 12-month period ending December 6, 2012, the Respondent, in conducting its business operations just described, purchased and received at the Pinto Valley Mine goods valued in excess of $50,000 directly from points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts and the Dispute

BHP mines and produces copper at the Pinto Valley Mine (the mine), an open-pit, 5,000-acre copper mine located near Miami, Arizona. BHP's parent company, BHP Billiton, acquired the mine in 1996. However, since that time mining operations have been started and stopped a number of times. Most recently, BHP restarted mining operations once more in 2012,[4] and at the time of the hearing was in the initial phases of reopening the mine, with full production scheduled to begin by June 2013.

In the course of reopening the mine, BHP has hired and/or recalled to work in excess of 500 employees. Further, the Employer has had to train significant numbers of these employees, and has had to develop and implement new systems, processes, procedures, and protocols related to safety, human resources, and record keeping. BHP's mining operations include the following categories: mine production, which involves the extraction of materials out of the pit to the primary crusher; mine maintenance, which involves the repair and maintenance of the equipment and machinery; and the milling execution, which involves the crushing, grinding, and concentration of the materials extracted during mine production.

Mining production work is a multi-step process that utilizes different pieces of equipment. First, a vertical rotary drill drives holes inside the ground pit, which is then blasted. After the blasts, earth-moving equipment, such as dozers, is used to dig or excavate the copper ore and other material from the ground. Next, rubber tire loaders and haul trucks are used to separate and haul the material from the pit to either the crusher or the dump. Finally, the ore is initially crushed and stockpiled. Employees who perform mining production work include loader operators, rotary drill operators, haul truck drivers, and multi-equipment operators. At the time of the hearing, the mine production division at the Pinto Valley Mine was divided into four crews, with each crew having between eight and twelve workers and with each crew having two supervisors. The supervisors report to Dale Loucks, who is the superintendant of mine production at the mine.

[4] All dates are in 2012, unless otherwise indicated.

It is very important to emphasize that most of the employees at the mine are represented by one of six labor unions. BHP and these six unions, acting jointly, are parties to a collective bargaining agreement, the terms of which are effective from July 1, 2010, through June 30, 2013. (G.C. Ex. 2.) The contract provides that newly hired employees are subject to a probationary period for their first 60 shifts. Further, the contract states that during that probationary period, newly hired employees shall have no seniority rights and no right to file a grievance under the terms of the contract. (G.C. Ex. 2, p. 28, Art. XV, Sec. J.) Lupita Gonzales, the Respondent's human resources superintendent, and an acknowledged supervisor and agent, testified that at new employee orientation, it is the Respondent's practice to inform newly hired employees that during their probationary period, they can be terminated for any reason. In any event, should newly hired mine production employees be employed beyond their probationary period, such employees would, under the terms of the collective bargaining agreement, be represented by the International Union of Operating Engineers, Local No. 428, one of the six labor unions signatory to the contract, and, thereafter, be employed under its terms and conditions, including the contractual grievance procedure.

BHP hired Edgar Newton as a loader operator in its mine production operation to begin work on September 4, 2012. In his post-hearing brief, counsel for the General Counsel emphasized Newton's 28 years of experience operating heavy equipment in the copper mining industry, having previously worked for several large mining companies. As is reflected in Newton's resume, his previous employment history included supervisory positions, as well as safety positions with his union. (G.C. Ex. 3.) There is no dispute that Newton was well qualified for the position for which he was hired. He was assigned to work on Crew 2, which crew was supervised by Edison "Chip" Begay and Orrin Merrill, who served as co-supervisors. Generally two crews worked at the same time, and there would occasionally be cross supervision, meaning Newton and his fellow Crew 2 co-workers might at times be supervised by supervisors from another crew.

All newly hired employees, including Newton, were required to undergo a training period. There were approximately 100 production employees initially hired as part of the Respondent's restart of the mine. Those employees went through a classroom training program in which they learned certain rules, regulations, and safety protocols for the mine and for operating equipment. This classroom instruction continued from early September through the middle of October. It was followed by extensive field training so that they could learn how to safely and efficiently operate machinery. This field training was required of all newly hired production employees, including those with very extensive previous experience in the mining industry, such as Newton. In the first several months of their employment, the production employees who were field training on the equipment did no actual copper production work, but, rather, were used primarily to repair roads and construct berms and generally to prepare the mine site for copper production. Overall, the Pinto Valley Mine employs approximately 600 employees, with mine production superintendent Loucks supervising the 100 production employees.

It is the Respondent's position that safety is a primary priority at the Pinto Valley Mine. The mine production superintendent and crew supervisors regularly hold daily safety meetings before the start of each shift. Loucks and his supervisors emphasized during their testimony that they encouraged their employees to raise safety concerns, of which they are aware, with management. Additionally, employees are allegedly encouraged to submit to management forms identifying safety issues and concerns. Of course, mining is an inherently dangerous business. While the evidence does support the Respondent's position that safety is an important element of the Respondent's operation, the undersigned has no way of determining whether the Respondent makes a greater priority of safety than do other mining companies.

During their probationary period, BHP employees received written weekly evaluations on their job performance. These evaluations were prepared by the crew supervisors, in Newton's case by Begay and Merrill. The supervisors graded employees on 11 work performance categories: Work Safety; Attitude; Quantity of Work; Quality of Work; Follows Instruction; Displays Team Attitude; Knowledge of Work; Interest & Initiative; Flexibility; Willingness to Learn & Advance; and Attendance. In each category, the employees received a score of one to ten, with ten being the highest, and a grade of "Acceptable or "Unacceptable." Additionally, each crew's supervisors recommended whether the Respondent should "Retain," or "Disqualify/Terminate" the employee. (Res. Ex. 1, 3, 7, & 16.) After filling out the weekly evaluation forms, the supervisors would meet individually with the employees on their respective crews to show them the evaluations, inform them of their ratings, advise them as to the reasons for their scores, and of any deficiencies in their work. The practice for Crew 2 was to have the crew members wait together outside as Begay and Merrill called them individually into the office to review each separate evaluation.

It is undisputed that the supervisors used their own discretion in scoring the employees, and no document existed that defined or explained the performance categories; what conduct justified receiving a particular score number; a grade of acceptable or unacceptable; and why an employee should be retained or terminated. Typically, the two crew supervisors signed the evaluation, as well as the employee being evaluated. However, the employees were not given copies of their evaluations, which ultimately were placed in the respective employees' personnel files.

While one employee, T.L. Miner, testified that Loucks had informed the employees that their evaluations would not play any role in deciding whether they passed their probationary period, that statement was denied by Loucks. Later in this decision for the reasons set forth in detail, I find Loucks to be a credible witness. Therefore, I credit his denial. Further, with the considerable effort put forth by the Respondent's supervisors in filling out the written evaluations and meeting individually with the probationary employees on a regular basis to present them with the evaluations, it is simply unreasonable to conclude that the Respondent would ignore those evaluations in deciding whether to retain employees or not beyond their probationary period. However, as will be noted in connection with Newton's termination, the evaluations were not always reviewed prior to a preliminary decision being made as to whether to retain or terminate an employee.

The process of filling out the weekly evaluations and meeting with the employees to discuss their performance did not actually start when most of the mine production workers began their probationary employment in early September. It was approximately four weeks after the employees began their training that the supervisors were instructed by upper management to complete weekly evaluations on their employees, and to do so retroactively for the weeks that had already passed. These early evaluations were apparently the only ones not shared with or signed by the employees.

Prior to the start of every shift, the Respondent conducted daily pre-shift safety meetings for the mine production crews. Loucks conducted the day shift safety meeting, while the night shift safety meeting was conducted by the various crew supervisors for the night shift crews. As I mentioned earlier, two crews would generally be working during all shifts, meaning two for the day shift and two for the night shift.

It is the contention of the General Counsel that Newton was very vocal at these safety meetings and in other conversations with individual employees, groups of employees, and supervisors where he complained about safety matters, about work rules and policies, about

certain supervisors, and where he talked about the benefits of union representation. On the other hand, it is the Respondent's contention that it encouraged employees to raise issues of concern regarding safety and other work related matters, and that Newton was no more vocal than other employees.

While counsel for the General Counsel argues in his post-hearing brief that Newton was the "most vocal employee from Crew 2," there is really no evidence to support that conclusion. Other employees, who testified at the hearing, as well as various supervisors, indicated that co-workers had similar complaints and concerns to those raised by Newton, and they expressed those complaints and concerns openly and freely. For example, Thayne Lavern Miner, II (T.L. Miner), a loader operator who had been a probationary employee on Crew 2, and who was called as a witness on behalf of the General Counsel, testified that he was outspoken about safety issues, and raised those concerns with co-workers, with supervisors, and with Loucks. He indicated that he had raised such issues at safety meetings, as did other employees. Further, he testified that BHP encourages its employees to raise such concerns, and even provides forms for employees to use when reporting safety issues. Significantly, he testified that he knew of no employees who were disciplined for raising safety concerns. At the time of the hearing, Miner was employed by the Respondent as a regular full time employee, having successfully completed his probationary period.

For the first three evaluation periods, all the employees on Crew 2, including Newton, received acceptable grades on their evaluations as during these periods they had been primarily engaged in class room instruction. It was not until late October that Newton had his first in a series of incidents that ultimately led to his termination. On October 28, Newton was instructed by supervisor Begay to work in a specific area of the "east pit haul road," pushing dirt up the road in order to fill in a dip. Newton had suggested to Begay that it would be better to start higher up the haul road, working his way down and fixing the road as he went. However, Begay was not persuaded, reiterated his initial instructions, and left Newton to perform the task as assigned.

It is clear from the testimony at the hearing that Newton and Begay did not get along. Newton had many years of experience in the industry and it appears that he sometimes thought that he knew better than Begay how to perform a task. Further, he apparently felt that Begay had problems communicating clearly to the employees. On several occasions Newton had complained about Begay to Loucks.

While their respective versions of the October 28 incident as testified to by Begay and Newton differ somewhat, the basic sequence of events is the same. Newton began driving his dozer and pushing dirt uphill toward the dip. He testified that he was initially performing the job as he had been instructed by Begay, until he was approached by Mike Stevenson, a supervisor for Crew 3, which Crew was working simultaneously with Crew 2. According to Newton, Stevenson agreed with him that it would be more efficient to be pushing the dirt downhill and redirected him to do so. Stevenson's testimony was somewhat different. He did not reposition Newton to push dirt downhill, as he claims that Newton was already doing so when he arrived, but merely to fill in the dip and to be careful not to push any debris towards the high wall side of the pit because there was a water line there that he did not want Newton to hit. According to Stevenson, he actually pointed out to Newton the water line coming from the upper east haul road. He testified that he told Newton, "[W]hatever you do, do not disturb that berm[5] over there. If you have to take any material, boulders or rocks or whatever you've got to get rid of, take it to

[5] I will take administrative notice that a berm is a low dirt wall used to protect a work area.

the pit side and just fill the dip in." Further, he testified, "I showed him the waterlines up above us, which you could see clearly coming into the berm, and then they came out of the berm and go into the [water] tanks."[6] Regarding the actual water line or pipes, Stevenson said, "[Y]ou could see them coming right out the side of the wall."

Subsequently, Newton struck the water pipe with the dozer or the rocks that he was pushing, causing the pipe to rupture. The water, which was under pressure, flew high in the air and was described by a number of witnesses as a "geyser." According to Newton's testimony, the water pipe was hidden by the berm and he did not know it was there.

Supervisors Begay and Merrill were actually driving in the area and were on the scene when Newton's dozer was pushing rocks into the berm and ruptured the pipe. According to Merrill's testimony, Begay immediately called Newton on the radio and told him to back away from the water, shut off his dozer and come over to talk with them. Merrill testified that Begay asked Newton why he was working at this point in the road, and Newton responded that Mike Stevenson had directed him to this spot. It is significant that Merrill testified that Newton told them that he could see the pipe and thought that he had more room so as to be able to push rocks off the haul road without hitting the pipe. According to Merrill, Newton was not apologetic, and although he admitted knowing the pipe was there and admitted hitting it, Newton's attitude was, "Things happen, let's move on."

Stevenson testified that he returned to the scene within 5 minutes of hearing on the radio that a water pipe had been ruptured. He got the water turned off and proceeded to have a conversation with Newton. According to Stevenson, he asked Newton why Newton had pushed material into the berm when Stevenson had specifically instructed him not to do so. Stevenson testified that Newton responded that he was trying to remove some rocks from the road and did not know how far into the berm the pipe was located. However, Newton never claimed that he did not know there was a water pipe buried in the berm, which, according to Stevenson, Newton could not have denied as the pipe was visible both as it entered and exited the berm. Stevenson characterized Newton's attitude as not being willing to admit that he had done anything wrong.

In response to this incident, Stevenson filled out an incident report and a HSEC[7] observation form. On the second page of the incident report Stevenson wrote, "Edgar had been instructed by me not to touch the berm around Mutt and Jeff [the water tanks] for any reason, but the first thing he did was to push big rocks into that berm anyway." (Res. Ex. 17.) Thus, the incident report is consistent with Stevenson's trial testimony.

In regards to the broken water pipe incident, Newton's testimony is substantially different than that of supervisors Loucks, Begay, Merrill, and Stevenson. Such variances exist throughout the hearing, whenever Newton's conduct or actions are questioned by management. This pattern is uniform throughout the hearing, with the testimony of the supervisors consistently different than that of Newton. There is no way to resolve these variances other than to make credibility determinations.

I did not find Newton to be a credible witness. He seemed to greatly exaggerate and embellish his testimony in an effort to place his actions in the best possible light. While witnesses often testify in a self serving manner, he did so much more than most. According to

[6] The water tanks are referred to by witnesses as the "Mutt and Jeff" tanks.

[7] HSEC stands for Health, Safety, Environment, and Community.

Newton's testimony, he is always right and his conduct appropriate, while the actions of his supervisors and managers are always wrong and inappropriate. While Newton has many years of experience working in the mining industry, he seems to have a conceited opinion of his knowledge, views and conduct. On the other hand, he seems to have a poor opinion of his supervisors' knowledge and actions, and almost one of derision and denigration. In particular, he has a poor opinion of supervisor Begay's abilities, and I get the strong impression after hearing Newton testify that he thinks that he could do a much better job as a supervisor than Begay.

Further, Newton did not hold up well under cross-examination. He was an unhelpful and intentionally difficult witness, often not answering the question asked, arguing with counsel for the Respondent, and "nitpicking" the questions directed to him. He wanted to argue or quibble over even unimportant or undisputed matters, which sometimes made his testimony confusing and difficult to follow. Also, while witnesses, especially alleged discriminatees, often become emotional while testifying, I am of the view that the emotion that he displayed, especially on cross-examination, was indicative of having his professional self worth heavily invested in proving that the Respondent was wrong to have terminated him.

Additionally, it should be noted that for the most part, the employee witnesses who testified on behalf of the General Counsel, such as T.L. Miner, did not appear to have seen Newton as a leader among the employees in the area of making safety complaints or bringing other work related concerns to the attention of management. In fact, Newton's actions in advising management of concerns which could be construed as protected concerted activity did not appear to be any greater than those concerns expressed by co-workers. Newton's contention to the contrary is a manifestation of his feelings of superiority. This is not surprising in view of his rather supercilious attitude towards his supervisors.

It is interesting to note that equipment operator Henry Ortiz, who attended the daily safety meetings with Newton, testified that management encouraged the employees to raise their concerns at these meetings and that various employees did so, including himself. While he testified that Newton "sometimes" spoke at these meetings, he did answer "Yes" in response to counsel for the General Counsel's somewhat leading question as to whether Newton was the most vocal employee at these safety meetings. Ortiz passed his probationary period, and at the time of the hearing he was the union steward at the mine for the Operating Engineers.

The supervisors on the other hand, in particular Loucks, Begay, Merrill, and Stevenson, all seemed to testify in a straight forward way without embellishment or exaggeration. They testified about Newton's conduct and actions without rancor towards Newton, and they left me with the impression of being appropriately concerned with performing their respective jobs to assist the Respondent in efficiently and safely mining copper, without any interest in discriminating against Newton because of his complaints or concerns about safety or other work related matters. As will be more fully discussed below, I find that the record is devoid of any credible probative evidence that any of the supervisors harbored animus towards Newton because of any protected concerted activity in which he may have engaged. While Begay and Newton did not get along, it appears that Begay's unhappiness with Newton was caused by Newton's displays of disrespect for Begay's supervisory ability, rather than for any other reason.

Finally, the supervisors tended to corroborate each other's testimony, which testimony was inherently probable and seemed to have the ring of authenticity to it. Therefore, unless stated otherwise, I find the testimony of Lucks, Begay, Merrill, and Stevenson to be credible, and I credit their testimony whenever it is conflict with that of Newton's testimony.

In his post-hearing brief, counsel for the General Counsel takes the position that following each of the incidents for which the Respondent allegedly ultimately fired Newton, there was no evidence that Newton was counseled for these alleged infractions or that his weekly performance evaluations reflected these incidents. However, this is simply not so. Begay and Merrill credibly testified that during the weekly evaluation sessions following each incident, they brought those incidents to Newton's attention in the form of an explanation as to why his written scores had declined.

Specifically regarding the ruptured water pipe incident, Newton received feedback and discipline from Begay and Merrill. On his weekly performance evaluation for the time period of November 5 through November 8,[8] Newton received unacceptable grades in every single category other than attendance. (Res. Ex. 3, p.7.) His scores for the categories of "work safely," "attitude," and "follows instructions" were 6's out of 10's, and he was also admonished to "step up performance and attitude" and "follow instructions" as part of that evaluation.

Also, Begay and Merrill both testified that Newton received those scores and grades in that time period because Newton had not followed Begay's instructions to push dirt up the hill on the east haul road, and because he did not follow Stevenson's instructions to stay away from the berm containing the water pipe. Merrill further testified that Newton received the unacceptable grades in every category because he had been aware of the water pipe and ruptured it anyway, because he did not have an apologetic attitude, because he disregarded explicit instructions, and because he did what he wanted to do, rather than follow the instructions that his supervisors had given him.

For the reasons that I have already noted, I found Newton's testimony, to the extent that it differs from that of Begay, Merrill, and/or Stevenson regarding the broken pipe incident itself, or differs from that of Begay and/or Merrill regarding the evaluation meeting where the incident was discussed, not to be credible.

The next incident that needs to be discussed occurred around mid-November and involved the allegation that Newton was operating a loader with the ladder hanging down, which would be a safety hazard. The loader is a large piece of equipment with a ladder needed to allow the operator to climb up to the controls. However, once the operator was at the controls, the ladder needed to be raised so as not to be in a down position where it might catch on something or someone while the loader was in motion. As with any piece of heavy equipment, it was the responsibility of the operator to check over the equipment during a "pre-operational inspection" before starting up that equipment. This was an absolute requirement by the Respondent to be performed by every operator prior to the startup of equipment. Further, the operator was required to fill out a pre-operation inspection check list as proof that the inspection had been conducted.

Newton testified that he conducted the inspection, noticed that the ladder was hanging down, and before starting to operate the loader he raised the ladder. Never the less, twice while he operated the loader the ladder went down. Each time it happened, water truck driver Robert Perez radioed Newton, informing him that the ladder was down. According to Newton, following each notification he stopped the loader and manually raised the ladder.

During the same approximate period of time, Newton was observed driving a small loader, which was leaking a stream of oil on the ground. Once again, the implication was that

[8] This was the first evaluation following the incident.

Newton had not adequately inspected his equipment before operating it. Newton testified that he had conducted the required pre-inspection of the loader and discovered that it was two gallons low on oil. He allegedly asked Johnny Orosco, the Respondent's heavy duty mechanic, to inspect the loader. Orosco found no visible oil leaks, after which he added two gallons. Approximately 15 minutes after Newton started operating the loader, water truck driver Robert Perez radioed Newton and informed him that the loader was leaking a trail of oil on the road. In any event, Newton then stopped the loader, inspected it and found no visible oil leaks. However, Orosco, who came to inspect the loader, did find a broken hose, which was the apparent cause of the leakage.

Of course, it is common knowledge that heavy equipment will on occasion leak oil, and I will take administrative notice of this fact. Supervisor Begay testified that such leaks do occur. However, he differentiated between a "leak," which leaves a "small drop," and a "trail" or "streak" of oil. He characterized the loader that Newton was operating as leaving a trail or streak of oil in its wake, which was considerably more severe than a simple leak. It was clear from Begay's testimony that in his opinion such a significant loss of oil from the loader should have been noticeable by Newton immediately, without his having to be informed of such over the radio.

Still another incident that occurred during the same approximate period of time involved Newton's alleged violation of the so called "200-foot rule." According to superintendent Loucks, this is a safety rule that has been implemented by the Respondent at the Pinto Valley Mine. Under this rule, any equipment operator that comes within 200 feet of people on the ground must stop, put his implements, such as a dozer blade, on the ground and make contact with them. This rule applies whether the operator moves into an area where people are working on the ground, or whether the people move into the operator's area. Loucks testified that it is the operator's responsibility and accountability to be aware of his surroundings and to make sure that the area in which he is working is free of any pedestrians.

It is apparent from the testimony of Loucks and others, such as supervisor Orrin Merrill, that the 200-foot rule placed the primary responsibility for its implementation on the operators of the equipment and not the pedestrians because it was the operators of these large and very heavy pieces of equipment that had the capacity, if not careful, to cause potential injury and even death to the much smaller, lighter pedestrians. In this regard, the laws of physics are obvious, and the rule simply requires the practical application of common sense. However, when testifying Newton seemed uncertain of the application of the rule. Especially on cross-examination, his answers regarding the rule were confusing, nitpicking, contradictory, and inconsistent. I believe that he deliberately attempted to avoid answering counsel for the Respondent's questions because in several instances he could not justify his operation of the equipment under the 200-foot rule.

It was during the November time period that Newton was first observed to have violated the 200-foot rule. Supervisor Merrill testified that he was in the bottom of the pit talking with two mechanics, all of whom were on the ground next to a dozer, when Newton, who was operating a loader, came within 80 feet of them. When Merrill noticed that Newton had gotten too close to them, he called Newton on the radio, asked him to come down, reminded him of the 200-foot rule, and told him not to let it happen again. Merrill characterized Newton's attitude towards the incident as "nonchalant," since "he just kind of shrugged it off."

According to Merrill's testimony, these incidents that occurred in the November time period were discussed with Newton by Merrill and Begay during their meeting on November 24 to review Newton's weekly evaluation. This was the weekly performance evaluation for the time period of November 16 through November 19. Newton received unacceptable grades in the

categories of "work safely," "attitude," and "follows instructions." He was also admonished to "step up performance and attitude" and "follow instructions" as part of that evaluation. (Res. Ex. 3, p. 8.)

Both Merrill and Begay testified that they discussed the incidents in question with Newton and reflected those incidents in his poor grades. According to Merrill, he explained to Newton that he was a competent machine operator, but his problem was in not following instructions and his attitude. According to Begay, he told Newton that he needed to be more conscious of how he operated his equipment, and Begay mentioned as examples the loader ladder incident and the loader leaking a trail of oil incident. As I find both Merrill and Begay credible and, for the reasons stated earlier, find Newton incredible, I conclude that, contrary to the contention of the General Counsel, the incidents in question were both discussed with Newton and reflected on his weekly evaluation. Further, I conclude that as testified to by Merrill, Newton's reaction to the criticism from his supervisors was that they were being unfair.

According to Newton, on November 29 he was questioned by supervisor Begay regarding the union, presumably meaning the Operating Engineers. Newton testified that on that date he was working the night shift when called on the radio by Begay sometime after 10 p.m., to check on the status of Newton's work assignment. Shortly thereafter Begay allegedly drove up but stayed in his pickup. Newton testified that he began to explain to Begay about the progress of the work that he was performing when Begay, without commenting about the work, asked "if [Newton] was going to be a union steward or if [Newton] was going to join the union." Newton testified that in response he said that he had been a steward before and that it was very time consuming, argumentative, and stressful, and he did not know whether he wanted to do that again. According to Newton, Begay's only reply was "ok," and he drove off. The conversation allegedly lasted about three minutes and nobody else was present. However, Begay testified that the conversation never took place. Further, he denied that he had ever asked Newton whether he was going to be the union steward, and would never ask an employee such a question.

On cross-examination, Newton could not seem to recall whether he ever mentioned this conversation with Begay about the union to anybody. At first he testified that, "I might've mentioned it to somebody, but I can't remember who or where." Then he next said that he told Dale Loucks about the incident, only to later say that he had merely mentioned to Loucks that he was having problems with Chip [Begay], but did not mention this specific incident. This effort by Newton to answer the question on cross-examination appeared to me to constitute an attempt to make up facts as he went along. I found Newton's story regarding this incident highly implausible. It strains credulity to believe that completely "out of the blue" Begay would drive over to Newton's work location to have a conversation with him about only one issue, whether Newton was going to became a union steward or join the union.

In fact, there is absolutely no evidence that Begay specifically or the Respondent in general harbored any animus towards the Operating Engineers Union. The Pinto Valley Mine is a very heavily unionized facility, with six labor unions, acting jointly, having a collective bargaining agreement with the Respondent. The work force at the facility is overwhelmingly union represented. Why would Begay care whether Newton was going to become the union steward or join the union? It makes no sense that he would be concerned one way or another.

I find Newton's story regarding this incident incredible. Further, having previously found Newton incredible and Begay credible for the reasons that I earlier expressed, I am of the view that this alleged conversation regarding Newton and the union never took place.

The incident that ultimately led to Newton's termination occurred on December 4 and it once again involved an alleged violation of the 200-foot rule. On that morning, Begay asked Newton to locate a missing dozer that had broken down, and when he found it to build a protective berm around the dozer so that the mechanics could safely repair the equipment. Newton was operating a rubber tire rig, which is a very large, heavy piece of machinery. Upon locating the dozer, Newton so informed the mechanics and they all met at the designated location. The two mechanics involved were Johnny Orosco, a heavy duty mechanic employed by the Respondent, and Joseph Lopez, a field service technician employed by Empire Machinery, which is the dealer from whom the Respondent purchases its equipment manufactured by Caterpillar Equipment.

The mechanics parked their service truck near the disabled dozer as they would need the boom and tools from the truck to make the repairs. Newton explained that he would need to construct a protective berm around the dozer so that the mechanics could safely make the repairs and that they could remain near the vehicles while he constructed the berm. However, the other directions that he gave the mechanics and what happened next, is in dispute.

According to Newton, he asked the mechanics whether they understood the containment rules and they allegedly indicated that they did. Newton contends that he directed the mechanics to stand in front of the bulldozer at all times so that he could see them because their service truck impeded his view. Newton testified that he used the rubber tire rig to begin pushing dirt and rock to construct the containment berm, making sure not to push the dirt towards the mechanics, but, rather, away from them towards the work area. However, the mechanics allegedly failed to follow his instructions and moved in between the dozer and the service truck where he could not see them. Further, Newton continues to place the blame on the mechanics because they failed to call him on the radio to tell him where they had gone.

Of course under the 200-foot rule as explained by Loucks and as would seem reasonable, it was the primary responsibility of the equipment operator, Newton, to know where pedestrians, the mechanics, were at all times, and to stop operating the rubber tire rig and put his blade on the ground until he could locate them. It was not the mechanics' primary responsibility to radio Newton.

While Newton did not admit that he ended up pushing the dirt directly towards the mechanics, the weight of the evidence indicated that was exactly what he did. Supervisors Merrill and Begay arrived on the scene to give the mechanics work permits and to unlock the dozer so that it could be worked on. Both supervisors testified that when they arrived they observed Newton pushing dirt with his rubber tire rig towards the back of the service truck where the mechanics were standing at a 45-degree angle at a distance of about 20 feet. That testimony was basically supported by the testimony of the two mechanics. Further, Orosco testified that he could see Newton in the cab of Newton's machine and that Newton could obviously see him since Newton was seated at a higher elevation on the rubber tire rig. Further, both Orosco and Lopez denied under oath that before beginning to push dirt Newton had directed them to stay at any particular location so as to be out of harm's way.

Upon arriving on the scene and observing the situation, Begay immediately called Newton on the radio and told him to stop, while Merrill hurriedly motioned to Newton to stop. Merrill testified that he made eye contact with Newton, and it was his opinion that Newton could easily see the mechanics. Begay and Merrill gathered Newton and the mechanics together, and Begay asked all of them the question, "What is wrong with this picture." When nobody responded, Begay answered his own question saying, "We're not supposed to be pushing [dirt]

towards employees here….There's big equipment pushing towards the two mechanics being exposed outside the equipment and the service truck."

Merrill took the mechanics aside and explained the 200-foot rule to them, which apparently they had not previously understood, and told them that they could not be inside a containment berm while it was being constructed. According to Merrill, the two mechanics were very receptive to his admonitions, were apologetic, and gave assurances that they would not let such a thing happen again.

In contrast to the attitudes of the two mechanics, Newton was, according to Merrill, unapologetic about the incident and continued to insist and argue that he had done nothing wrong. The conversation ended with Newton being instructed to finish constructing the containment berm, this time obviously without the mechanics being present inside.

To the extent that there are variances in the testimony of Newton when compared to that of Merrill and Begay regarding this incident, I accept the testimony of the two supervisors who I have already found to be credible as opposed to Newton who I have found not to be so. Further, the testimony of the two mechanics tends to support the Respondent's contention that Newton's actions violated the 200-foot rule. While various diagrams and charts were utilized by counsel in questioning the witnesses to this incident, I did not find these visual aids particularly helpful. However, the testimony of the two mechanics plus that of Merrill and Begay paints a fairly clear picture of what happened. Within the restricted confines of the containment berm that Newton was constructing, he proceeded to push dirt and rocks towards the mechanics, perhaps as close as 20 feet of them, while operating a very large, heavy machine. Common sense dictates that not only was this a violation of the 200-foot rule, it was a very dangerous situation. Newton's protestations and arguments to the contrary, his conduct would obviously have constituted a great potential danger to the physical well being of the mechanics. This dangerous situation was reflected in the HSEC Observation form that Begay filled out and both Begay and Merrill signed shortly after the incident, which indicated that Newton's risky behavior had resulted in a "near miss" of harming the two mechanics. (Res. Ex. 15.)

Immediately following this incident, Begay and Merrill had a conversation about what had just occurred and about Newton's employment history. According to Merrill's testimony, they discussed the various safety violations that Newton had been involved in, which included two violations of the 200-foot rule, his poor attitude towards safety, and his problems following instructions. Merrill testified that they were "tired [of] talking and coaching [Newton], and he was just not receptive." Begay and Merrill collectively came to the conclusion that Newton should be terminated, and they went to see Loucks to inform him of the incident that had just occurred and to ask him to consider discharging Newton. Merrill testified that Loucks agreed with them that the recent violation of the 200-foot rule was egregious and that based on Newton's employment history that he should be terminated.

Loucks contracted Lupita Gonzalez, human resource superintendent, and informed her that he had an employee, Newton, that "had a history of incidents, [who] was still in the probationary period, and that we wanted to terminate his employment." According to the testimony of Loucks, this was a "team decision" to terminate Newton, the team being composed of Loucks; Fernando Rodriguez, manager of production; Lupita Gonzales; Begay; Merrill; and David Weickhardt, the general manager of the mine. Initially, on December 4, only Loucks, Gonzales, Merrill, and Begay met to discuss Newton. They made a preliminary decision to terminate him. Loucks testified that the decision was based on Newton's work history and incidents, specifically: "the water pipe issue, the ladder issue, the oil issue…his attitude,…[having been] approached by his supervisors and trainers to operate in a specific way

and he refused to do that, and then the straw that broke the camel's back was the issue with the rubber tire dozer, pushing into pedestrians." Both Weickhardt and Rodriguez were subsequently consulted on the matter and approved the decision to fire Newton.

Gonzalez testified that when she met with Loucks, Begay, and Merrill on December 4 that she took notes. (Res. Ex. 8.) Those notes reflect that they discussed the violation of the 200-foot rule, with Newton "pushing material towards folks on the ground, [specifically] BHP mechanic and Empire employee in harm's way, [and with] Edgar [Newton] argumentative [when approached by] Chip & Orrin [who] saw the whole thing." Further, there is a reference to "[r]oller coaster on safety during the probationary period." Gonzalez testified that by that reference she meant that Newton had previously "had several incidences of safety violations and this was the trigger for his termination."

While not entirely clear from the record, it seems that on either December 4 or 5 Newton went to talk with Loucks. It appears from Loucks' testimony that this meeting must have occurred on December 4, because Loucks had not yet been informed by Begay and Merrill regarding the violation of the 200-foot rule. Newton wanted to give Loucks his version of the events in question, and Loucks testified that Newton seemed to blame the "mechanics [for] enter[ing] his area" while he was constructing a containment berm and "pushing dirt." However, Loucks was unimpressed with Newton's argument, testifying that he concluding that "everybody has to be aware of their own environment, and has to be aware of all things going around, so again, it ultimately is the operator's responsibility to make sure that his area is safe." Regarding the "pedestrian's," meaning the mechanics, Loucks testified that at the time of the incident, "there was no SOP [standard operating procedure] disallowing" them from entering the area in which Newton was working. Clearly, Loucks was of the view that the responsibility for the incident rested upon Newton as the equipment operator.

Lupita Gonzalez testified that at the meeting on December 4, she learned from Merrill, Begay, and Loucks about the various incidents that the supervisors considered in deciding to recommend Newton's termination, such as the broken pipe incident, and, of course, the immediate violation of the 200-foot rule. However, while she asked to have Newton's weekly evaluations sent to her for review, it does not appear that she actually had reviewed them prior to her concurring in the supervisors' recommendation to terminate Newton. Also, it is undisputed that neither Gonzalez nor Loucks interviewed the two mechanics prior to reaching the decision to fire Newton. According to Gonzalez, after conferring with the supervisors, she concurred with their recommendation to fire Newton since he had an "unacceptable safety behavior….and was probably not a good fit for our organization, because we do have high standards on safety."

On December 5, Gonzalez, Loucks, Begay, and Merrill met with Newton to inform him that he was being terminated. It was Loucks who gave Newton the bad news and explained the reasons for his discharge. According to Newton, he tried to explain his version of the incident with the two mechanics, but Loucks cut him off and said that while there might be two sides to every story, Newton was "not the employee that [the Respondent] was looking for here at the mine." At that point, Newton asked whether his probationary period could be extended or whether there was anything that he could do to enhance his safety ability. Newton was asked to step outside the room so that the managers could discuss his request. While he was out of the room the mangers agreed not to extend Newton's employment and that the termination would stand. Newton was called back into the room and told that the decision was final and he was officially discharged. Such is reflected in Gonzalez' notes of that date. (Res. Ex. 8.) The meeting ended with Newton signing a copy of his termination notice. (G.C. Ex. 5.)

Finally, it should be noted that it is undisputed that under the terms of the collective bargaining agreement between the six unions representing employees at the mine and the Respondent that probationary employees have no right to file grievances over any disciplinary action taken against them. Accordingly, although the contract provides for progressive discipline, it does not apply to probationary employees such as Newton. (G.C. Ex. 2.)

B. Legal Analysis and Conclusions

It is the position of the General Counsel, as alleged in complaint paragraphs 4(c) and 4(d), that Newton was fired because he was actively engaged in protected concerted activity by discussing work related concerns with fellow employees, by vocally expressing those concerns at safety meetings, and in conversations with the Respondent's supervisors and managers. According to the General Counsel, the reasons given by the Respondent for terminating Newton were nothing more than a pretext. On the other hand, it is the position of the Respondent that Newton was terminated for cause, specifically for a lax attitude towards safety, for failing to follow the directions of his supervisors, and for a general disregard for the Respondent's policies and procedures. The Respondent insists that Newton's discharge was unrelated to any protected concerted activity in which he may have engaged.

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1987); *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.,* 335 NLRB 1037, 1038 (2001); *Meyers Industries,* 268 NLRB 493. 479 (1984). An employer violates Section 8(a)(1) of the Act when it discharges an employee, or takes some other adverse employment action against him, for engaging in protected concerted activity. *Rinke Pontiac Co.,* 216 NLRB 239, 241, 242 (1975). It is axiomatic that an employer violates Section 8(a)(1) of the Act when it interferes with, restrain, or coerces employees for engaging in protected concerted activity.

The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or induce or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries,* 281 NLRB 882 (1986), affirmed 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988); See *Mushroom Transportation Co., v. NLRB,* 330 F.2d 683, 685 (3rd Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or… it had some relation to group action in the interest of employees"); See also *NLRB v. City Disposal Systems, Inc.,*465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example 'the lone employee' who "intends to induce group activities")

It is beyond question that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that communication between employees "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit Systems,* 337 NLRB 510 (2002); citing *Container Corporation of America,* 244 NLRB 318, 322 (1979).

In the matter before me, there can be no doubt that Newton engaged in protected concerted activities. The Respondent does not seriously deny that Newton had such activity, only that his actions and conduct were unremarkable, as other probationary employees were equally involved in protected concerted activities. It is undisputed that Newton occasionally raised issues of concern at the daily pre-shift safety meetings, as testified to by Newton, fellow employees, and supervisors.

However, other employees also raised such concerns at these meetings including employees T.L. Miner and Henry Ortiz, both of whom testified on behalf of the General Counsel. Miner acknowledged that he himself was personally "outspoken" about safety. Only Ortiz, in response to a somewhat leading question from counsel for the General Counsel as to whether Newton was the most vocal employee at these safety meetings, indicated, "Yes." At the time of the hearing, Ortiz was the union steward for the Operating Engineers, and, therefore, was predisposed to testify favorably towards Newton. Although, in a more candid moment, when asked simply whether Newton spoke at these meetings, he responded, "sometimes." The bulk of the testimony from the various supervisors and managers, as well as from Miner, Ortiz, and even Newton himself, was that many employees occasionally complained at the safety meetings, and that, in fact, the Respondent encouraged its employees to raise such concerns.

It is also accurate that Newton took advantage of Loucks' open door policy and on occasion went to see Loucks to complain about various employment policies and other matters such as different supervisors giving conflicting instructions and in particular about the alleged poor supervisory skills of Edgar Begay. However, there was no evidence presented that Loucks resented Newton's comments, and it appears from Loucks' credible testimony that he continued to encourage Newton to bring such matters to his attention. Further, Newton was certainly not the only probationary employee to bring concerns to his supervisor. Miner testified that he himself was "pretty outspoken" about safety matters, when at pre-shift safety meetings, with co-workers, and directly with supervisors, including Loucks. According to Miner, other employees similarly raised complaints, and the Respondent encouraged them to do so.

Further, it is true that Newton frequently engaged other employees in conversations about their working conditions including their pay, the perceived unfairness of the evaluation system, safety issues, and the benefits of union representation. However, from the testimony of Newton himself, as well as that of the other employee witnesses, it seems that all the probationary employees shared these concerns and frequently discussed such matters with co-workers when the opportunity presented itself.

Perhaps the one area where Newton may have had more information than others to disseminate was regarding union representation. Newton had many years of experience working in union organized mines, and had previously been a union steward.[9] Therefore, he was able to speak about such matters from experience. However, the Pinto Valley Mine was heavily organized. As noted, the vast majority of the employees were represented by one of six unions that were jointly parties with the Respondent to a collective bargaining agreement. As soon as their probationary period was over, the employees in Newton's crew, as well as the other three probationary crews, who were all already included in the production unit represented by the Operating Engineers, would automatically be entitled to the coverage and all the protections of the contract.

[9] Newton's resume, which he submitted to the Respondent when he applied for employment, indicates that he previously "held mine safety positions with the union." (G.C. Ex. 3.)

Therefore, it is clear that Newton did engage in protected concerted activities while employed at the Respondent's mine, as did many other probationary employees. However, what must still be determined is whether that protected concerted activity was in anyway the cause of Newton's termination.

In *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.,* 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has failed to make a *prima facie* showing that Newton's protected concerted activity was a motivating factor in the Respondent's decision to terminate him. In *Tracker Marine, L.L.C.,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.,* 352 NLRB 815, fn.5 (2008) (citing *Gelita USA, Inc.,* 352 NLRB 406, 407, fn.2 (2008); *SFO Good-Nite Inn, L.L.C.,* 352 NLRB 268, 269 (2008); Also see *Praxair Distribution, Inc.,* 357 NLRB No. 91, fn.2 (2001). In any event, to rebut the presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280, fn.12 (1996); *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991).

As I have already found, there is no doubt that Newton was engaged in protected concerted activities. He spoke up at pre-shift safety meetings voicing his concerns, complained to Loucks and other supervisors about work related matters, and spoke with fellow employees about matters relating to their wages, hours, and working conditions, including the perceived unfairness of the evaluation system, complaints about supervisors and show up pay, and the advantages of being protected by the collective bargaining agreement. The fact that Newton engaged in such protected activity is really not in dispute. However, it is significant that the Respondent encouraged its employees to raise safety concerns and other complaints with management, and numerous probation employees, including Newton, took the opportunity to do so.

It is also without dispute that the Respondent was well aware of Newton's protected conduct. Managers and supervisors were present at pre-shift safety meetings when he voiced his complaints. Further, as Newton availed himself of Loucks' open door policy, Loucks was

aware of certain matters of concern to Newton such as different supervisors giving contradictory orders, and in particular of Newton's unhappiness with supervisory Begay. After such a discussion, Loucks had even offered to transfer Newton to a different crew not supervised by Begay, but Newton declined the offer. Newton visited Loucks as many as four times, including those two occasions when he came to Loucks to explain his version of the incident where he broke the water pipe and the final incident where his dozer was pushing dirt towards the two mechanics in violation of the 200-foot rule.

However, despite counsel for the General Counsel's "Herculean" efforts to establish that Newton was somehow the leader among the members of his crew in their protected concerted activities, the credible probative evidence does not support such a finding. Supervisors, as well as employees Henry Ortiz and T.L. Miner, all testified that numerous employees raised safety complaints at the pre-shift safety meetings, and that, in fact, they were encouraged to do so by management. Newton may have been a union steward at some previous place of employment, a matter that was apparently known to a number of employees and to the Respondent, but he was not at the time of his employment at the Pinto Valley Mine engaged in specific, significant "union activity," and no such allegation is made in the complaint by the General Counsel.

Further, there was no credible evidence that the Respondent, whose work force at the Pinto Valley Mine is heavily unionized, was in any way concerned by Newton's conversations with other employees about the benefits of union representation. As I concluded earlier, I credit Begay's denial that he ever asked Newton whether he was interested in becoming the union steward. Further, I credit the denials of Begay and Merrill that they ever intentionally overheard the employees in Crew 2 talking with Newton about unions as the employees waited to be called individually for their weekly evaluations. In this regard, it is important to note that the General Counsel does not allege in the complaint anything about unlawful surveillance or the impression of surveillance by the Respondent.

Obviously, Newton's discharge constituted an adverse employment action, but the issue in dispute remains whether that discharge was in anyway motivated by Newton's protected concerted activities. I am of the belief that the General Counsel has failed to establish such a connection. Newton was a probationary employee. As the probationary employees, including Newton, would soon be completing their probationary period, it simply made sense for the Respondent to terminate those employees, whose work performance was unacceptable, prior to their conversion to regular employee status.

There is nothing suspect about the timing in this case, Just the opposite, as the termination comes the day after Newton's violation of the 200-foot rule, which put the physical well being of the two mechanics in jeopardy. Further, it does not appear that the Respondent "set up" Newton, merely waiting for an opportunity to fire him. Newton had been having problems following directions from his supervisors and the Respondent's rules for some time. He had disregarded Begay's instruction as to where he should begin his road repair work on the day that he broke the water pipe, and ignored Stevenson's instruction to avoid pushing material into the berm where the pipe was buried. He had either not fully conducted the required pre-inspection of equipment regarding the dozer that leaked a stream of oil and the loader with its ladder hanging down or had not noticed the problems until they became severe. And finally, he had twice violated the 200-foot rule, the last time on December 4, endangering the two mechanics.

Supervisors Loucks, Bega, Merrill, and Stevenson all credibly testified that Newton's attitude was poor. However, contrary to counsel for the General Counsel's contention that a "poor attitude" is a euphemism for engaging in protected conduct, in this specific instance it

clearly meant that when Newton was counseled by his supervisors, instead of accepting responsibility for his mistakes, he made excuses for his conduct, blaming others, or simply saying that it was no big deal. Under these circumstances, it is understandable that the Respondent, having decided that Newton's work performance was poor and did not warrant his retention, would want to terminate him before the end of his probationary period, which was rapidly approaching.

The General Counsel has also failed to establish that the Respondent harbored any animus towards Newton because he engaged in protected concerted activity. Without animus, it is very difficult to show any connection between that activity and Newton's termination.

In complaint paragraph 4(b), it is alleged that on about November 24, 2012, supervisor Begay interrogated employees [Newton] regarding "union membership, activities, and sympathies." In order to establish this allegation, the General Counsel relies entirely on Newton's testimony, as fully discussed above, that Begay asked him whether he intended to become a union steward, presumably for the Operating Engineers. However, as I have already indicated, I discredited Newton's testimony and credited Begay's denial that such a conversation with Newton ever occurred. Newton's testimony on cross-examination was inconsistent and contradictory, first saying that he had mentioned the conversation with Begay to somebody but he could not recall who, then saying it was Loucks, and then finally admitting that it was not Loucks, but insisting that it was still somebody who he could not recall.

It simply makes no sense that either Begay in particular, or the Respondent in general, would be in anyway interested in whether Newton became a steward or not. As I have repeatedly said, the Pinto Valley Mine is a very heavily unionized operation. The vast majority of the Respondent's employees are represented by one of the six unions, which jointly are parties to a collective bargaining agreement with the Respondent. Undoubtedly, the Respondent's managers and supervisors, Begay included, deal with union stewards on a regular basis. It is illogical to think that, under those circumstances, Begay would be concerned as to whether or not Newton would become a union steward or, for that matter, even a member of the union.

Further, it is interesting to note that Henry Ortiz, a multi-equipment operator, who was a probationary employee on Crew 2 at the same time as Newton, was at the time of the hearing the union steward for the Operating Engineers. Ortiz testified that at the time he was selected to be union steward he went to see Loucks and asked Loucks what he thought about it. According to Ortiz, Loucks replied, "You should follow your heart, and if that is what you want to do, you should do it." That statement by Loucks, the production superintendent, was certainly not indicative of an anti-union attitude by the superintendent, or by the Respondent in general.

As I have concluded that the alleged conversation between Begay and Newton regarding the union never took place, I also find that there was no alleged "interrogation" of Newton by Begay. Accordingly, I shall recommend to the Board that complaint paragraph 4(b) be dismissed.

It is axiomatic that the mere fact that one participates in union or protected concerted activity does not insulate that employee from discharge. In a case very similar to the matter at hand, the Board sustained the findings of the administrative law judge who concluded that the employer had substantial justification to discharge the alleged discriminatee because "he was a difficult employee to work with,…did not take orders readily,…often wanted to do things his way regardless of what supervision told him,… and, basically had a very poor attitude." As with the case at hand, although the alleged discriminatee had protected activity, there was no evidence

of animus towards that activity. *See, e.g. Spalding Division of Questor Corporation,* 225 NLRB 946, 949-950 (1976).

In the case before me, I conclude that the General Counsel has failed to make a *prima facie* showing by a preponderance of the evidence that Newton's protected concerted activity was a motivating factor in the Respondent's decision to terminate him. The evidence presented by counsel for the General Counsel was insufficient to establish a nexus or connection between Newton's protected concerted activity and the Respondent's decision to discharge him.

However, even assuming, for the sake of argument, that the General Counsel had established a *prima facie* case, the evidence is clear that the Respondent would still have discharged Newton, even absent any protected activity. Newton's conduct established a pattern of disregarding his supervisors' instructions, of ignoring the Respondent's rules and policies, and of unsafe actions. Still, it was only after the most egregious incident that he was terminated.

During the course of Newton's probationary period, he disregarding the instructions from supervisor Begay as to where he should begin to push dirt with his dozer the day he broke the water pipe and disregarding instructions from supervisor Stevenson regarding not pushing material into the berm where the pipe was buried. He drove a loader with the ladder hanging down, either not adequately conducting the required pre-operation inspection, or failing to be aware of his equipment's condition while in operation. Next he was observed driving a small loader leaking a stream of oil, again the result of either not adequately conducting the required pre-operation inspection, or failing to be aware of his equipment's condition while in operation.

Those incidents were followed by the potentially more dangerous violations of the 200-foot rule. The first of these violations occurred in November and was witnessed by supervisor Merrill. Newton was observed operating a loader within 80 feet of two mechanics and Merrill, all of whom were on the ground together talking. He was stopped, and counseled by Merrill regarding the rule. However, according to Merrill, Newton's attitude towards the incident was "nonchalant," as he merely "shrugged it off."

The second and even more serious incident occurred on December 4, when, as is fully described earlier in this decision, Newton was observed operating his dozer within 20 feet of two mechanics, and pushing dirt in their direction as he constructed a containment berm. He was stopped and immediately counseled by Merrill and Begay. However, Newton again displayed a poor attitude, blaming the mechanics and downplaying the incident. It was this incident, when combined with the others, which resulted in his termination the following day.

It is important to note that, as I have discussed above, certain of Newton's weekly evaluations reflected his supervisors' unhappiness with his conduct and actions, and they discussed his deficiencies with him at the time he was presented with each evaluation. At the hearing, a considerable amount of time was devoted to discussing the evaluations. However, in my view, these evaluations are not particularly helpful in resolving the issues in this case, as the evaluations were not actually reviewed or relied upon by Loucks and human resource superintendent Lupita Gonzalez before the preliminary decision was made to terminate Newton. Merrill and Begay orally informed Loucks of their reasons for recommending Newton's termination, Loucks concurred, and the information was then given to Gonzalez, who also concurred.

During the hearing, a dispute arose regarding the authenticity of several of Newton's weekly evaluations placed in evidence by the Respondent. Newton testified that since he had

originally signed them, his evaluation for the period of November 5 through November 8 (Res. Ex. 3, p. 7.) and his evaluation for the period of November 16 through November 19 (Res. Ex. 3, p. 8.) had been altered to reflect lower grades and negative comments. As was the Respondent's practice at the time, Newton had not received a copy of his weekly evaluations when his supervisors reviewed them with him and he signed them.

Merrill testified that the written evaluations in question had not been altered in any way and appearing exactly as they had at the time that Newton signed them. Further, Julie Clark, Loucks' administrative assistant, identified the original evaluations in question, from which the copies in evidence had been made, and testified that she retrived them from Newton's personnel file, and also testified regarding the method by which such records are stored by the Respondent. According to Clark, she was able to differentiate the originals from the copies because she could feel the indentations on the paper made by the pressure of the writer's pen.[10] These alleged originals were then placed in evidence by the Respondent. (Res. Ex. 18 & 19.) The alleged originals and the copies are identical, except for the notations made by the court reporter.

Newton offered no evidence to support his contention that his evaluations had been altered. I continue to conclude, for the reasons stated earlier, that Newton was an incredible witness. I do not believe his story that the evaluations have been changed, and this appears to be a continuation of Newton's practice of exaggerating and embellishing his testimony. I find it very difficult to believe that when he testified in March of 2013, Newton was able to recall with specificity the grades and remarks contained on his evaluations from November of 2012. In this regard, I continue to find Merrill credible, and I credit his testimony that the evaluations in evidence remain unchanged from those originally presented to Newton.

Further, I see no logical reason why the Respondent would be interested in altering the evaluations. Newton testified that Begay had told him that he was being "dinged" for the broken water pipe and loader ladder incidents when Newton, Begay, and Merrill had met to discuss his weekly evaluation. During his testimony, Newton did not deny that the incidents with the broken water pipe, the loader ladder, the stream of oil from the small loader, and the two alleged 200-foot rule violations had occurred, but merely that they were either not his fault or that they were rather insignificant. I see nothing to be gained by the Respondent allegedly altering the evaluations, simply to make it seem as if the supervisors were even more upset and unhappy with Newton's work performance than they already appeared to be.

In any event, I find the entire dispute regarding the written evaluations and the alleged alteration to be, "much ado about nothing." As I have said, the initial recommendation from Begay and Merrill to terminate Newton was concurred in by Loucks and Gonzalez without any reference to Newton's written evaluations. The preliminary decision to discharge was based on the oral representations of Begay and Merrill regarding Newton's failure to follow instructions from supervisors, disregard for the Employer's rules and policies, and, in particular, his disregard for safety. Begay and Merrill felt that the accumulated incidents regarding the water pipe, loader ladder, leaking loader, and two violations of the 200-foot rule were sufficient to terminate Newton, and Loucks and Gonzalez accepted their recommendation. While Gonzalez testified that she ordered Newton's evaluations, she apparently did not actually see them until after the decision to fire Newton was approved. Therefore, the evaluations are not particularly relevant to the issues before me, except to further document Newton's poor work performance.

[10] The undersigned stated on the record that I could not feel the indentations referred to by Clark.

In that regard, I do accept the evaluations as accurate, and they serve as corroboration for the credible testimony of Begay and Merrill.

Counsel for the General Counsel argues that Newton was treated in a disparate fashion, allegedly demonstrating that the reasons given by the Respondent for Newton's termination were a pretext. However, the facts do not support this contention. While it is accurate that among the production workers in Crew 2, comprised of 8-12 employees, that Newton was the only probationary employee to be terminated, there were certainly other employees in other production crews and among other groups of the Respondent's employees who were similarly disciplined. In fact, it was the unrebutted testimony of human resource superintendent Lupita Gonzalez that in the second quarter of 2012, approximately 7 probationary employees were terminated from the various divisions of the mine.

Charles Byers was hired by the Respondent on September 4, 2012 as a multi-equipment operator in mine production. (Res. Ex. 4, p. 15.) He was terminated on November 29, 2012, while still a probationary employee. (Res. Ex. 4, p. 1.) According to the unrebutted testimony of Dale Loucks and Lupita Gonzalez, Byers was terminated for refusing to follow instructions and safety guidelines. (Res. Ex. 4, p. 11-13.) It should also be noted that although Byers was receiving evaluations with very poor grades and negative comments from his supervisors, the "retain" box on the evaluations was being checked by his supervisors. (Res. Ex. 4, p. 11-13.) This was very similar to the situation with Newton, who while getting poor grades and negative comments from his supervisors was also still having his "retain" box checked on his evaluations.

Also, at about the same time that Newton was terminated, two other probationary employees, who were laborers in the concentrator, Daniel Darger and Brandon Evanston, were terminated. According to the testimony of Gonzalez and their personnel records and evaluations, Darger was hired on September 17, 2012 and fired on December 7, 2012, due to poor work performance and issues with unsafe procedures and not following instructions (Res. Ex. 5, pp. 2-3, 6 & 8-12); and Evanston was hired on September 10, 2012, and fired on October 5, 2012, for failing to follow instructions and safety protocols (Res. Ex. 6, pp. 2-4, 7,& 6.).

Thus, it appears that at about the same time that Newton was terminated, at least three other probationary employees, Byers, Darger, and Evanston, were fired by the Respondent from the Pinto Valley Mine for similar misconduct. Also, as with Newton, it seems that these three other probationary employees had each been counseled a number of times prior to their terminations.

Counsel for the General Counsel makes much of the fact that while Newton was fired almost immediately following the 200-foot rule incident on December 4 when he was observed pushing dirt to within 20 feet of two mechanics, that T.L. Miner was not terminated for a similar incident. However, following the testimony of Merrill, who observed the incident, and Miner, it is clear that while the incidents were similar, they were sufficiently different so as to warrant a different outcome.

According to the testimony of Merrill, the same day that he and Begay observed Newton pushing dirt towards the two mechanics, December 4, they also observed Miner committing a violation of the 200-foot rule. Miner was operating a loader and "dressing up the berms," but was working too close to two employees, Christopher Flynn and Steve Edwards, who were on the ground. Edwards was a driller and haul truck driver and both he and Flynn worked on Crew 2. Merrill and Begay observed Miner within 35-40 feet of the two operators when Begay radioed Miner to stop his equipment. Merrill testified that when the mistake was pointed out to the three employees, all of them, including Miner, were very apologetic, recognized their mistake, took

responsibility, and indicated it would not happen again. Merrill favorably compared Miner's reaction to that of Newton, who blamed others for the mistake, did not apologize, and merely shrugged off the incident. In Merrill's opinion, the difference was in attitude, with Miner having a positive attitude following counseling, unlike Newton whose attitude was negative.

Miner testified that the 200-foot rule was instituted by Loucks in the October to November 2012 time period. He indicated that the rule was frequently violated, but did not suggest that such violations of the rule were observed by management. He recalled the incident where his violation of the rule was observed by Merrill and Begay. At first he indicated that while he was counseled for the violation, he was not disciplined for it, and his weekly evaluation did not reflect his having committed the violation. However, on cross-examination by counsel for the Respondent, Miner acknowledged that Merrill and Begay had counseled him at the time of the incident, warning him that it should not happen again, and that he had reacted apologetically. Further, he then admitted that in the evaluation for the period of December 3 to December 6, Merrill and Begay had lowered his grades because of his recent violation of the 200-foot rule, and that they had stated on the form that he needed to be "more aware of surroundings…[and] more aware of employees in the work area." (Res. Ex. 1, last page.)

Steve Edwards also testified briefly about the incident with Miner and Flynn where they had violated the 200-foot rule. Edward's testimony corroborates the testimony of Miner and Merrill, and Edward's acknowledged that he was counseled by Merrill and Begay at the time and that his weekly evaluation negatively reflected the incident.

It is the position of the Respondent that Newton was terminated following his December 4 violation of the 200-foot rule because he had accumulated a series of significant rule violations involving safety issues and his failure to follow policy and the instructions of supervisors. Further, as explained earlier, this was his second violation of the 200-foot rule, and his attitude upon being counseled was poor. On the other hand, Miner had only the one violation of the 200-foot rule, did not have such an accumulation of instances of misconduct, and when counseled, Miner's attitude was positive.[11] The Respondent contends that Miner's record warranted only a warning and counseling, plus a grade reduction on his evaluation.

I agree with the Respondent's contention that the respective violations of the 200-foot rule by Newton and Miner on December 4, which resulted in different disciplinary actions because of significantly different employment histories was not unreasonable, and does not establish disparate treatment. Further, when viewed in its entirety, the discipline issued to Newton, Miner, Byers, Darger, and Evanston shows that Newton was treated reasonably, and not in a dissimilar way to those other probationary employees.

In summary, I find that while Newton was engaged in protected concerted activity, the General Counsel has failed to establish by a preponderance of the evidence that such activity was a "motivating factor" in the Respondent's decision to terminate him. Further, I find that even assuming the evidence is viewed as having established a *prima facie* case, the evidence still supports a finding that the Respondent would have terminated Newton, even in the absence of the protected concerted activity in which he engaged. Accordingly, I shall recommend to the Board that complaint paragraphs 4(c) and 4(d) be dismissed, and, as they are related, that paragraphs 5 and 6 of the complaint also be dismissed.

[11] Miner did have an incident where he broke a water pipe, but this was after his probationary period had ended, and is not analogous to such an incident occurring during a probationary period.

Conclusions of Law

1. The Respondent, BHP Copper, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

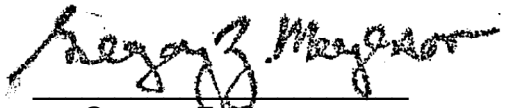
2. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D.C. on July 18, 2013.



Gregory Z. Meyerson
Administrative Law Judge

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.